

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>90-10533</u>
JOHN EDWARD BOWLING)	
PAMELA D. BOWLING)	
)	
Debtors)	
<hr/>		
)	
TRUST COMPANY OF AUGUSTA, N.A.)	
)	
Movant)	
)	
vs.)	Filed
)	at 9 O'clock & 45 min. AM
JOHN EDWARD BOWLING)	Date: 10-18-90
PAMELA D. BOWLING)	
)	
Respondents)	

ORDER

Trust Company Bank of Augusta, N.A. ("Trust Co.") the holder of an allowed unsecured claim in this Chapter 13 proceeding objects to confirmation. The facts are not disputed. Trust Co. has an allowed unsecured claim in the amount of Two Thousand Nine Hundred Twenty Eight and 94/100 (\$2,928.94) Dollars. In addition to Pamela D. Bowling, debtor, Stanley W. Driver, the debtor's father is obligated under the promissory note that establishes Trust Co.' claim in this case. The Chapter 13 plan as it pertains to the claim of Trust Co. proposes to pay the claim in full with future interest.

In accordance with Bankruptcy Local Rule 8¹ the Chapter 13 trustee proposes to pay future interest at a rate of 12% per annum on the rust Co. claim. Additionally, the plan provides

3(a) By failing to object to this plan, or any modifications thereof, all creditors holding claims agree not to make any effort to collect their claims from any co-signer that may exist, so long as the case remains

¹Bankruptcy Local Rule 8 provides:

11 U.S.C. §502 provides in relevant part that a proof of claim filed in accordance with §501 is deemed allowed unless objected to by a party in interest and further provides that upon objection the claim shall be allowed "except to the extent that - - (2) such claim is for unmatured interest."

It has been called to the attention of the court by parties before it that many creditors are regularly filing claims which include not only the principal balance of a debt as of the date of the filing of a debtor's case but which also include future interest on said claims.

Without in any way limiting or amending any other provision of the Code or Rules that govern the filing of proofs of claim, all claims filed in this court shall hereafter be filed for the net principal balance only as of the date of the debtor's filing of his or her case.

Unless otherwise ordered by the Bankruptcy Judge, the Chapter 13 Trustee is directed to pay interest at a rate of 12% per annum on all allowed secured claims and is further directed to file objection or notify debtor's counsel with respect to any claim which is not filed in accordance with the terms of this order.

The sanction provisions of Bankruptcy Rule 9011 apply to claims filed in violation of applicable provisions of the Bankruptcy Code and Rules.

pending. (hereinafter referred to as "3(a) provision")

Trust Co. objects to the debtors' plan which includes the 3(a) provision.

This court has previously denied a creditor's motion for relief from a codebtor stay established under a confirmed plan containing the identical 3(a) provision. First National Bank & Trust Co. v. Pennington (In re: Pennington) Chapter 13 Case #8911667 (Bankr. S.D. Ga. August 23, 1990). The issue before the court in Pennington was not whether a proposed plan containing the complained of 3(a) provision is subject to valid objection but rather, once a plan containing such a provision has been confirmed, does that order of confirmation bind the creditor. This court at footnote 4 page 6 of the Pennington decision stated "[t]he propriety of the 3(a) plan provision was not questioned at confirmation and is not reached by this order." The propriety of such provision is now squarely at issue in this objection.

The objected to 3(a) provision is not an extension of the codebtor stay established under 11 U.S.C. §1301². Through the

²11 U.S.C. §1301 provides:

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter [11 USC §1301 et seq.], a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless

(1) such individual became liable on or secured such debt the ordinary course of such individual's business; or
(2) the case is closed, dismissed, or converted to a case

order

of plan confirmation the debtor seeks to establish an injunction against the creditor prohibiting action to collect a debt from a codebtor. Bankruptcy Code 1301 is narrowly drawn and "designed to protect a debtor operating under a Chapter 13 individual repayment case by insulating him from indirect pressure from his creditors

under chapter 7 or 11 of this title
[11 USC §701 et seq. or 1101 et seq.].

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

exerted through friends or relatives that may have cosigned an obligation of the debtor. The protection is limited, however, to ensure that the creditor involved does not lose the benefit of the

bargain he made for a cosignor." H.R. Rep. No. 595, 95th Cong., 1st Sess. 426 (1977). Additionally, "[t]he automatic stay under this section [1301] pertains only to the collection of a consumer debt, Therefore, not all debts owed by a Chapter 13 debtor will be subject to the stay of the codebtor" S. Rep. No. 989, 95th Cong. 2nd Sess. 138 (1978).

The legislative history of §1301 clearly establishes the limited application and purpose of the codebtor stay. The broader relief sought under the 3(a) provision requires general injunctive relief issued pursuant to 11 U.S.C. §105³ in accordance with

³11 U.S.C. §105(a) provides:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Bankruptcy Rules 7001⁴ and 7065⁵. Such codebtor protection is available only through an adversary proceeding seeking injunctive

relief. Any final judgment may establish an injunction which may be incorporated in a plan of reorganization⁶. The debtors' attempt to obtain an injunction against a creditor pursuing collection from a codebtor is an impermissible extension of the Chapter 13 plan confirmation procedure⁷. Accord, Green Tree Acceptance, Inc. v. Calvert (In re: Calvert) 907 F.2d 1069 (11th

⁴Bankruptcy Rule 7001 provides in pertinent part:

An adversary proceeding is governed by the rules of part VII. is a proceeding . . . (7) to obtain an injunction or other equitable relief.

⁵Bankruptcy Rule 7065 provides in pertinent part:

Rule 65 F.R.Civ.P. applies in

⁶The requirement to obtain the injunction by complying with the procedural safeguards of an adversary proceeding is true under any plan of reorganization under Chapter 11, 12 or 13.

⁷The debtor could obtain the prior consent of the creditor and codebtor affected and avoid the necessity of an adversary proceeding, but consent must be overt. The failure to object to confirmation is not consent.

Cir. 1990)⁸. In re: Simmons, 765 F.2d 547 (5th Cir. 1985)⁹.

Instances do exist where injunctive relief against a creditor preventing collection actions against a codebtor beyond the limited codebtor stay available under §1301 (or §1201) are vital to the successful reorganization of a debtor, but in such instance the adversary proceeding process must be pursued. See e.g. In re: Kasual Kreation. Inc. v. Heller Financial Inc., (In re: Kasual Kreation Inc.), 54 B.R. 915

(Bankr. S. D. Fla. 1985); Otero Mills, Inc. v. Security Bank & Trust Co., (In re: Otero Mills, Inc.) 21 B.R. 777 (Bankr. D. N.M. 1982) and Lumas Financial Corporation v. The Northern Trust Company (In re: Lumas Financial Corporation), 117 B.R. 64 (Bankr. S.D. N.Y. 1990).

The imposition of an injunction preventing a creditor's pursuit of a codebtor without first obtaining the consent of the creditor and codebtor, or judgment granting the injunction pursuant to an adversary proceeding, is an impermissible

⁸Under Green Tree, in determining value of a secured claim, the bankruptcy court may act only in conjunction with hearing on notice to holder of the secured claim pursuant to Bankruptcy Rule 3012 and the mere notice that the court will hold a confirmation hearing on a proposed plan without inclusion of notice specifically directed at the security valuation process does not satisfy the bankruptcy rules requirement that specific notice be given to a secured claim holder that the court will determine the extent to which the claim is secured.

⁹Under Simmons, the confirmation of a plan which mischaracterizes a secured claim as unsecured does not have the affect of voiding the creditor's lien. Separate and apart from the confirmation process 11 U.S.C. 506 provides a distinct procedure for the allowance and disallowance of claims.

provision of a debtor's plan of reorganization. The objection of Trust Co. is sustained. Within ten (10) days of the date of the entry of this order, the debtor shall propose a modified plan eliminating the 3(a) provision upon which order of confirmation will issue without further hearing. Upon the failure of the debtors to modify the plan in accordance with the terms of this order, this Chapter 13 proceeding shall be dismissed without further hearing.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 18th day of October, 1990.